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VIA ECF

July 28, 2025
Hon. Ona T. Wang
Southern District of New York

> *In re OpenAI, Inc.*, *Copyright Infringement Litigation*, 25-md-3143 (SHS) (OTW)
> This Document Relates To: *The New York Times Company v. Microsoft Corporation et al.*,
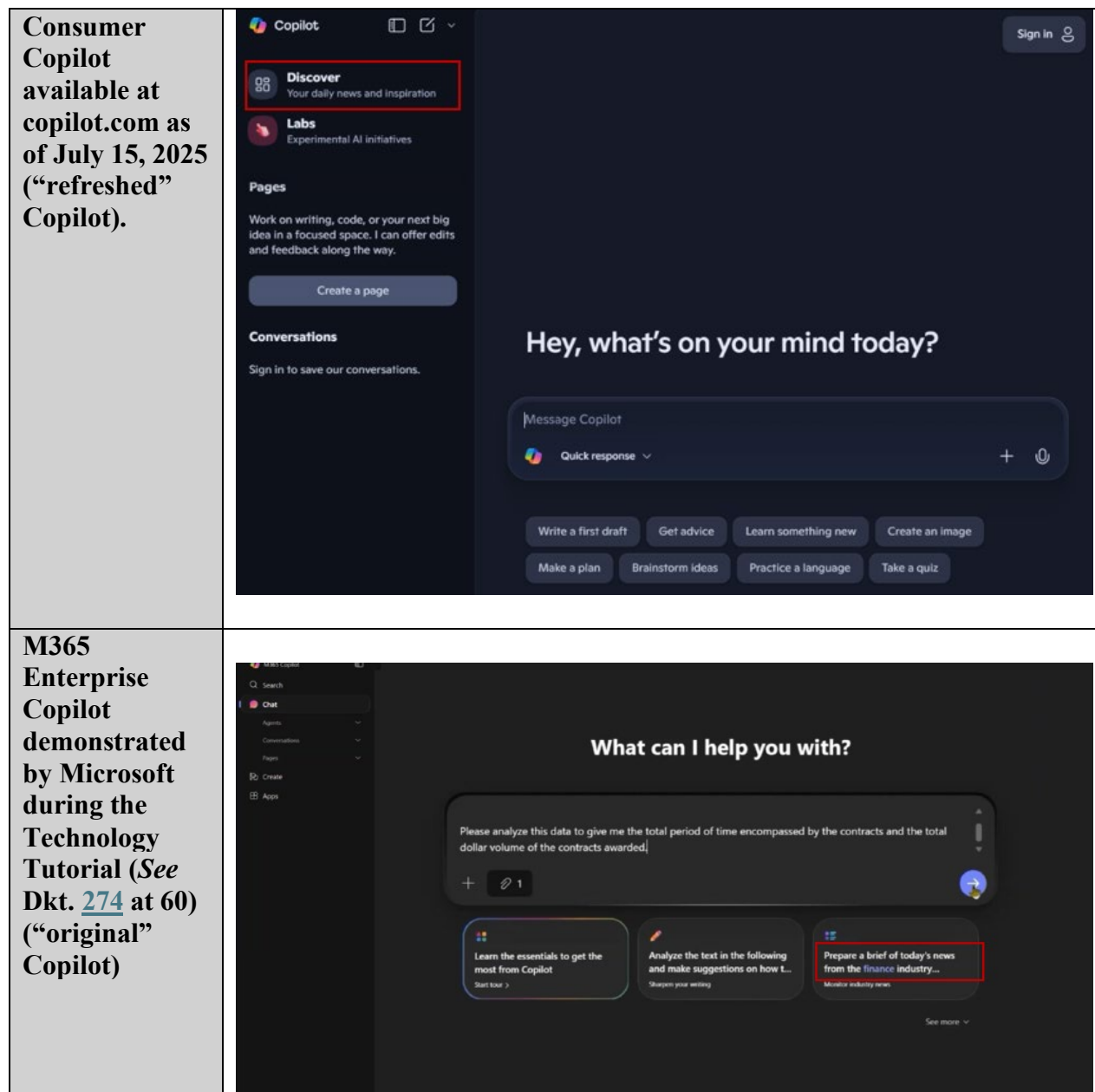>   1:23-cv-11195

Dear Magistrate Judge Wang:

I write on behalf of Plaintiffs The New York Times Company ("The Times"), Daily News, LP, *et al.* (the "*Daily News* Plaintiffs"), and the Center for Investigative Reporting (collectively, the "News Plaintiffs") in connection with News Plaintiffs' pending motion to compel Microsoft to provide discovery into all versions of Microsoft's Copilot chatbot product. *See* Case No. 1:23-cv-11195 ("*Times*") Dkt. 487. At the May 27, 2025 discovery conference, this Court deferred ruling on News Plaintiffs' motion until after the June 26, 2025 Technology Tutorial (the "Technology Tutorial") so that the Court could learn "more about the distinctions between the two products, how they work." *See* May 27, 2025 Discovery Hearing Tr. at 112:18-24. News Plaintiffs submit this renewed motion requesting that this Court grant the requested discovery in view of the Technology Tutorial presentations.

First, the "refreshed" consumer Copilot and M365 Copilot (i.e., original consumer Copilot) are virtually indistinguishable. Microsoft clarified at the Technology Tutorial, for the very first time, that the original consumer Copilot (formerly known as Bing Chat) is still in operation today as enterprise Microsoft 365/M365 Copilot. June 26, 2025, Hearing Tr. at 270:9-20. Recognizing that the original consumer Copilot bears the same name as the refreshed consumer Copilot product, Microsoft attempted to draw an analogy to the Shelby GT-350 and Mach-E Mustangs having the same name but different designs. *See* Dkt. 274 at 88. But unlike the Mustangs depicted in

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Microsoft's Technology Tutorial demonstratives, the purportedly "refreshed" and "original" Copilots look nearly identical:[1]

Consumer Copilot available at copilot.com as of July 15, 2025 ("refreshed" Copilot).	
M365 Enterprise Copilot demonstrated by Microsoft during the Technology Tutorial (*See* Dkt. 274 at 60) ("original" Copilot)	

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[1] The products are so similar that News Plaintiffs (mistakenly) believed that the M365 Copilot shown in Microsoft's Technology Tutorial demonstratives was the "refreshed" consumer Copilot. *See* June 26, 2025, Hearing Tr. at 201:13-21, 252:13-22.

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Notably, both "Copilots" contain prompts for users to explore news, exactly the kind of substitutive use that News Plaintiffs have alleged. Dkt. 72 (The Times's Second Amended Complaint) at ¶¶ 72, 81, 95, 102, 108-123; Case No. 1:24-cv-03285 (*Daily News*) Dkt. 1 (Daily News Complaint) at ¶¶ 69, 93, 96, 114-138.

Second, the "refreshed" consumer Copilot infringes News Plaintiffs' copyrighted content in the same way as the original consumer Copilot product by using the same core retrieval augmented generation ("RAG") functionality and OpenAI's large language models. At the Technology Tutorial, Microsoft extended its "Mustang" analogy by arguing that the "original" and "refreshed" versions of consumer Copilot are "different under the hood." *See* Dkt. 274 at 88. But Microsoft explained that the RAG process "**is the core of the Copilot product** that's available both on the Enterprise desktop and in the **consumer chatbot**." *See* June 26, 2025, Hearing Tr. at 257:15-258:3 (emphasis added). This "RAG" process is the very same process News Plaintiffs alleged Microsoft used to create infringing "synthetic search results" in the operative Complaints. Dkt. 72 at ¶¶ 72, 81, 95, 102, 108-123; *Daily News* Dkt. 1 at ¶¶ 69, 93, 96, 114-138. The fact that Microsoft's current M365 Enterprise Copilot is the same "product" and performs RAG in the same way as the original consumer Copilot reinforces News Plaintiffs' position that the technology at the core of Microsoft's past and current versions of Copilot remains the same and likewise harms News Plaintiffs in the same manner as alleged in News Plaintiffs' complaints.

Moreover, Microsoft confirmed that Copilot is powered by the GPT-4o large language model, which is an OpenAI model that is indisputably part of these litigations. OpenAI has agreed that GPT-4o is part of these cases and has been providing discovery into GPT-4o—including written discovery, model inspection, training data inspection, and source code inspection—and this Court has ruled that GPT-4o is within the scope of the Class Action cases to which the News cases are coordinated under the MDL. *See* Case No. 1:23-cv-08292 (*Authors Guild*) Dkt. 293. Microsoft's assertion that it never agreed that GPT-4o is part of the case ignores the reality that the parties have been undertaking discovery into GPT-4o for nearly nine months. *See Times* Dkt. 269. Furthermore, Microsoft's publicly available documents show that the M365 Copilot Product—i.e., the "original" consumer Copilot that Microsoft demonstrated during the technology tutorial and agreed is at issue in these cases—is also powered by GPT-4o.[2]

Third, Microsoft's refusal to provide discovery into the "refreshed" version of consumer Copilot hamstrings News Plaintiffs' ability to investigate evidence critical for its case and to rebut Microsoft's fair use defense. *See* June 26, 2025, Hearing Tr. at 257:15-258:3 (emphasis added). Namely, Microsoft's refusal to engage in discovery after October 2024 for the consumer version of Copilot—a product that is copying News Plaintiffs' articles in exactly the manner alleged in News

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[2] https://www.microsoft.com/en-us/microsoft-365/copilot/chat#faq

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Plaintiffs' complaints—prevents News Plaintiffs from discovering and setting forth "evidence that the copying has already caused market harm" and "evidence that the copying is likely to cause market harm in the future." *See Kadrey v. Meta Platforms, Inc.*, No. 23-cv-03417, 2025 WL 1752484, at *16 (N.D. Cal. June 25, 2025). This evidence is critical for showing how Defendants' copying impacts the market for News Plaintiffs' works under the fourth fair use factor.

To be clear, News Plaintiffs are not seeking all of the code for Copilot "written from scratch by about 300 people" in 2024. June 26, 2025, Hr. Tr. at 272:11-13. Instead, News Plaintiffs seek discovery tailored to the issues in these cases, and ask the Court to issue an order compelling Microsoft to: (1) update its responses to News Plaintiffs' interrogatories to encompass information about Copilot that extends both before and after October 2024; (2) search for and produce documents responsive to News Plaintiffs' requests for production that relate to Copilot both before and after October 2024, including producing documents that were withheld on the basis that they relate to the "refreshed Copilot"; (3) produce output log data, source code, training data, and any models for Copilot in response to News Plaintiffs' requests for inspection, without an artificial date limitation; and (4) provide News Plaintiffs with user engagement metrics from Microsoft's dashboards.

Respectfully,

/s/ Steven Lieberman
Steven Lieberman
Rothwell, Figg, Ernst & Manbeck, P.C.

cc: All Counsel of Record (via ECF)